No. 26-426

IN THE

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Petitioners,

v.

D.V.D., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF UNITED NATIONS SPECIAL RAPPORTEUR ON MIGRANTS, FORMER UNITED NATIONS SPECIAL RAPPORTEURS ON MIGRANTS, FORMER UNITED NATIONS SPECIAL RAPPORTEURS ON TORTURE, FORMER MEMBERS OF THE UNITED NATIONS COMMITTEE AGAINST TORTURE, AND OTHER INTERNATIONAL HUMAN RIGHTS EXPERTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT.....6

ARGUMENT 9

I. FARRA Incorporates CAT Article 3's Destination-Specific Obligation, as the U.S. Has Long Recognized 9

A. FARRA Implements Article 3 and Adopts the Convention's Meaning 9

B. The Non-Refoulement Obligation Attaches to the Actual Destination.....12

C. The U.S. Has Repeatedly Acknowledged That Third-Country Removals Require Notice of the Destination and an Opportunity to Raise Fear Concerns.....13

II. Article 3 Requires a Pre-Removal Opportunity to Raise a Destination-Specific Risk.....15

A. Notice Must Come in Time to Contest the Destination, and Review Must Precede Removal 15

B. A Procedure That Depends on Unprompted Disclosure Will Miss Those at Greatest Risk 17

III. Article 3 Reaches Foreseeable Onward ("Chain") Refoulement 20

A. FARRA and Article 3 Reach Indirect Return 20

B. The Committee Has Applied Article 3 to Onward Removal for Over Twenty-Five Years 20

C. The Record Confirms That the Risk of "Chain" Refoulement Is Real 22

D. Other National and Regional Courts Agree 23

IV. Individualized Diplomatic Assurances May Inform, but Not Replace, the Article 3 Assessment 24

A. Assurances Are Evidence to Be Weighed, Not a Substitute for the Inquiry 24

B. The Regulations and Past Executive Practice Treat Assurances as Case-Specific 27

C. Blanket Assurances Cannot Address the Risks Article 3 Guards Against 29

D. *Munaf v. Geren* Does Not Hold Otherwise 32

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

U.S. Cases

A.A.R.P. v. Trump,
605 U.S. 91 (2025) 18

Abbott v. Abbott,
560 U.S. 1 (2010) 12

Johnson v. Guzman Chavez,
594 U.S. 523 (2021) 15

Medellín v. Texas,
552 U.S. 491 (2008) 11

Munaf v. Geren,
553 U.S. 674 (2008) 9, 33

Nasrallah v. Barr,
590 U.S. 573 (2020) 11

Sanchez-Llamas v. Oregon,
548 U.S. 331 (2006) 12

Trump v. J.G.G.,
604 U.S. 670 (2025) 18

United States v. Duarte-Acero,
208 F.3d 1282 (11th Cir. 2000) 12

International and Foreign Decisions

Agiza v. Sweden,
Commc'n No. 233/2003, U.N. Doc.
CAT/C/34/D/233/2003 (May 20, 2005) 16, 17

Ayas v. Sweden,
Commc'n No. 97/1997, U.N. Doc.
CAT/C/21/D/97/1997 (Nov. 12, 1998) 22

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App. No. 47287/15 (Eur. Ct. H.R. [GC] Nov. 21,
2019) 24

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Commc'n No. 88/1997, U.N. Doc.
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Commc'n No. 832/2017, U.N. Doc.
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2011) 24, 25

Othman (Abu Qatada) v. United Kingdom,
App. No. 8139/09 (Eur. Ct. H.R. Jan. 17, 2012) 31

Pelit v. Azerbaijan,
Commc'n No. 281/2005, U.N. Doc.
CAT/C/38/D/281/2005 (May 1, 2007) 25, 26

R (AAA (Syria)) v. Secretary of State for the Home Department,
[2023] UKSC 42 (Nov. 15, 2023) 24

Suresh v. Canada (Minister of Citizenship & Immigration),
[2002] 1 S.C.R. 3, 2002 SCC 1.....31

X v. Kazakhstan,
Commc'n No. 554/2013, U.N. Doc.
CAT/C/55/D/554/2013 (Aug. 3, 2015) 17

Z.T. v. Australia,
Commc'n No. 153/2000, U.N. Doc.
CAT/C/31/D/153/2000 (Nov. 11, 2003) 22

Statutes

8 U.S.C. § 1231 note 11

Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, § 2242(a), 112 Stat. 2681-822 (Oct. 21, 1998).....2, 11

Regulations

8 C.F.R. § 208.18(c) 33

8 C.F.R. § 208.18(c)(1) 27, 28

8 C.F.R. § 208.18(c)(2) 28

8 C.F.R. § 1208.16(c) 13

8 C.F.R. § 1208.16(c)(2)-(3).....12, 13

8 C.F.R. § 1208.18(a) 30

8 C.F.R. § 1208.18(a)(1).....29, 30

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64 Fed. Reg. 8478 (Feb. 19, 1999).....13

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136 Cong. Rec. S17486-01, 1990 WL 168442 11

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U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).....27

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U.N. Doc. CAT/C/GC/4 (Sept. 4, 2018) .....11, 12, 14, ...15, 20, 21, 24, 30

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Joint Observations of Canada, Denmark, the United Kingdom, and the United States of America on Para-graphs 19–20 of the Committee Against Torture's Draft General Comment No. 1 (2017) on Implementation of Article 3 in the Context of Article 22 (Mar. 31, 2017) 15

Manfred Nowak, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/60/316 (Aug. 30, 2005) 27

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U.N. Doc. HR/P/PT/8/Rev.2 (2022) 18, 19

OHCHR*, Special Procedures of the Human Rights Council – Introduction to the Special Procedures* .. 1

Oral Argument Transcript in *Riley v. Bondi*, No. 23-1270 (Mar. 24, 2025) 13, 14

Report of the Special Rapporteur on the Human Rights of Migrants, Gehad Madi*, Externalization of Migration Governance: New Trends and Spe-cific Aspects*,
U.N. Doc. A/HRC/62/35 (May 14, 2026) 21

Report of the Special Rapporteur on the Human Rights of Migrants, Gehad Madi: *Externalization of Migration Governance and Its Effect on the Human Rights of Migrants*,
U.N. Doc. A/80/302 (Aug. 4, 2025) 16

S. Exec. Rep. No. 101-30 (1990) 10

Special Procedures Mandate Holders, Allegation Letter to the United States,
AL USA 20/2026 (Aug. 31, 2026) 20

The Principles on Effective Interviewing for Investigtions and Information Gathering, Assoc. for the Prevention of Torture, May 2021 19

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U.N., *1946 Convention on the Privileges and Immunities of the United Nations,* 1 U.N.T.S., Feb. 13, 1946 1

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INTEREST OF *AMICI CURIAE*[1]

This *amicus* brief is submitted by the United Nations Special Rapporteur ("UNSR") on the human rights of migrants, Mr. Gehad Madi.[2] He files this

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and that no person or entity except *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] UNSRs are part of "[t]he system of Special Procedures" that "is a central element of the [UN] human rights machinery and covers all human rights: civil, cultural, economic, political, and social." OHCHR, *Special Procedures of the Human Rights Council – Introduction to the Special Procedures*, https://www.ohchr.org/en/special-procedures-human-rights-council/special-procedures-human-rights-council. They serve as independent human rights experts selected for their "(a) expertise; (b) experience in the field of the mandate; (c) independence; (d) impartiality; (e) personal integrity; and (f) objectivity." They "undertake to uphold independence, efficiency, competence and integrity through probity, impartiality, honesty and good faith" and "not receive financial remuneration." *Id.*

In the performance of his mandate as UNSR on the human rights of migrants, Mr. Madi has the legal status of an expert on mission for the UN within the meaning of Articles VI and VII of the 1946 Convention on the Privileges and Immunities of the United Nations, to which the United States of America has been a party since 1970. Accordingly, UNSR Madi enjoys such privileges and immunities as are necessary for the independent exercise of his functions, including immunity from legal process of every kind in respect of words spoken or written, and acts done by him in the course of the performance of his mission.

UNSR Madi submits this *amicus curiae* brief voluntarily without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the UN, its officials and experts on mission, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S., Feb. 13, 1946, https://www.icj-cij.org/other-texts/convention-on-the-privileges.

brief jointly with other *amici curiae*, including former UNSRs on the human rights of migrants and former UNSRs on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as former members and Chairpersons of the United Nations Committee Against Torture ("UNCAT" or the "Committee")—the expert body established under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT" or the "Convention") to monitor its implementation—and current and former holders of other human rights mandates. In those capacities, *amici* have interpreted and applied Article 3 of the Convention in hundreds of individual cases and country reviews, conducted fact-finding visits to places of detention on every continent, and examined first-hand how States use, and misuse, diplomatic assurances and post-transfer monitoring.

Amici submit this brief on the third question presented to assist the Court in understanding what the obligations Congress implemented through the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, § 2242(a), 112 Stat. 2681-822 (Oct. 21, 1998) ("FARRA") require in practice: a destination-specific assessment of the risk of torture, made before removal, through procedures capable of surfacing and adjudicating that risk. *Amici* offer the Committee's interpretive guidance and their own experience as persuasive aids to the construction of CAT

UNSR Madi further clarifies that authorization for the positions and views expressed herein, in full accordance with the independence of his mandate, was neither sought nor given by the UN, including the UN Human Rights Council, the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.

treaty obligations, FARRA, and its implementing regulations.

Gehad Madi serves as the current UNSR on the human rights of migrants. He previously served on the United Nations Committee on the Rights of the Child from 2011 to 2023, where he contributed to the development of standards on international human rights related to the international migration and human rights of children. Mr. Madi also previously served as the Deputy Foreign Minister and Director of the Diplomatic and Consular Corps Department of the Egyptian Ministry of Foreign Affairs.

Felipe González Morales was UNSR on the human rights of migrants from 2017 to 2023. He is Professor of International Law at Diego Portales University in Chile, where he also directs the master's Program in International Human Rights Law. Previously, he served on the Inter-American Commission on Human Rights ("IACHR") (2008-2015). Throughout his career, he has worked extensively on the protection of migrants, refugees, and asylum seekers, including through the examination of State practices concerning immigration detention and deportation.

François Crépeau was UNSR on the human rights of migrants from 2011 to 2017. He is Professor Emeritus of Public International Law at McGill University Faculty of Law, where he held the Hans and Tamar Oppenheimer Chair in Public International Law from 2009 to 2022 and served as Director of the Centre for Human Rights and Legal Pluralism from 2015 to 2020. During his mandate as UNSR, he conducted numerous country visits, including to immi-

gration detention facilities, and issued thematic reports addressing the human rights of migrants, immigration detention, border management, and the protection of migrants in vulnerable situations.

Juan E. Méndez served as UNSR on Torture from 2010 to 2016. He was Professor of Human Rights Law in Residence at American University Washington College of Law ("AUWCL") and Faculty Director of its Anti-Torture Initiative until September 1, 2025, when he retired. He previously served as UN Special Adviser on the Prevention of Genocide (2004–2007) and as President of the International Center for Transitional Justice (2004–2009), a non-governmental organization that assists societies confronting legacies of mass human rights abuses. His mandate as UNSR included country visits, thematic reporting, and the examination of individual allegations of torture and refoulement.

Claudio Grossman is Professor of Law, Dean Emeritus, and Raymond Geraldson Scholar for International and Humanitarian Law at AUWCL, where he served as Dean from 1995 to 2016. He was a member of UNCAT from 2003 to 2015, and its Chairperson from 2008. From 2013 to 2014, Grossman was the Chairperson of the UN human rights treaty bodies. He was a member and twice President of the IACHR (1993–2001). Since 2017 he has been a member of the UN International Law Commission, where he served as Chair of the Drafting Committee in 2019 and as Special Rapporteur on Immunity of State Officials from Foreign Criminal Jurisdiction since 2023, a topic that was approved by the Commission in July of this

year. He is the author of over one hundred publications, and has participated in some of the most relevant human rights cases at the regional and universal systems.

Diego Rodríguez-Pinzón was member and rapporteur of UNCAT until December 2021. He is full-time faculty at AUWCL and Co-Director of the Academy on Human Rights and Humanitarian Law, as well as the LLM in International Human Rights and Humanitarian Law at that academic institution. He previously served as *ad hoc* Judge in the Inter-American Court of Human Rights of the Organization of American States from 2007 to 2011.

Manfred Nowak served as UNSR on Torture from 2004 to 2010. He is Professor of Human Rights and Secretary General of the Global Campus of Human Rights, a network of more than 100 universities jointly organizing eight regional master's programs in human rights, democracy, and sustainability in various world regions. He previously served as UN expert on enforced disappearances (1993–2006) and as an international judge of the Human Rights Chamber for Bosnia and Herzegovina (1996–2003). He is the author of more than 600 publications, including the leading article-by-article commentary on CAT.

Jens Modvig, M.D., Ph.D. in Public Health, served as a member of UNCAT from 2014 and as its Chairperson from 2016 to 2021. He is a Senior Medical Officer at DIGNITY – Danish Institute Against Torture and a member of the International Forensic Expert Group. He was a co-editor of the Istanbul Protocol and has developed the health component of Den-

mark's National Preventive Mechanism under the Optional Protocol to the Convention Against Torture. He has conducted numerous monitoring visits to places of detention in Denmark and abroad, and his work concerns the forensic documentation of torture and the clinical assessment of survivors.

Amici also include **Todd F. Buchwald**, former member of UNCAT and former Ambassador, United States ("U.S.") State Department Office of Global Criminal Justice; **Selma Sassi-Safer**, member of the African Commission on Human and Peoples' Rights and its Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants; and **Robert Goldman**, Professor at AUWCL, former President of the International Commission of Jurists and of the IACHR, and former UN Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism.

SUMMARY OF ARGUMENT

This case does not concern whether class members may be removed. It concerns what must happen when the Government, having obtained an order removing a person to one country, decides instead to send that person to a country never named in the order, never examined by any adjudicator, and, under the Policy[3]

[3] The term "Policy" as used in this brief refers to the two internal DHS memoranda establishing procedures for removing noncitizens to third countries not designated in their removal proceedings: (1) the Mar. 30, 2025 *Guidance Regarding Third Country Removals,* issued by then-DHS Secretary Kristi Noem, J.A. 306–09; and (2) the July 9, 2025 *Third Country Removals*

of the Department of Homeland Security ("DHS"), sometimes never disclosed before the plane leaves. The obligation Congress implemented through FARRA cannot be honored by such a procedure, for four reasons.

First, FARRA incorporates a destination-specific obligation. Article 3 of CAT forbids return "to another State" where there are substantial grounds for believing the person "would be in danger of being subjected to torture," and it directs the competent authorities to consider all relevant circumstances "in the State concerned." Congress adopted that obligation as the policy of the U.S., directed that FARRA's terms reflect the Convention's meanings, and ordered regulations to implement it. Those regulations ask whether the person is likely to be tortured "in the proposed country of removal." A finding about Country A says nothing about Country B. The Government's contention that class members already had their opportunity to raise fear-based claims (Pet. Br. 44) therefore misses the point: no one can raise a claim about a destination not yet identified. The U.S. has twice told this Court that removal to a third country requires notice of that country and an opportunity to raise a fear of torture there.

Second, the Article 3 inquiry must be capable of identifying the people it is meant to protect. UNCAT has long read Article 3 to require that each case be examined individually, that the person be informed of the intended destination in a timely manner, and that

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Following the Supreme Court's Order in Department of Homeland Security v. D.V.D., No. 24A1153 (U.S. June 23, 2025), issued by then-Acting ICE Director Todd M. Lyons, J.A. 310–13.

review be available before removal. The Policy fails each of these in its ordinary operation. It instructs officers not to ask whether the person fears the destination; it allows as little as six hours between notice and removal; and, for countries from which the State Department has accepted assurances, it provides no notice and no opportunity to be heard at all. *Amici*'s extensive experience documenting torture and interviewing survivors teaches that persons at greatest risk are the least likely to volunteer a fear, unprompted and within hours, to the officers detaining them, about a country they may know nothing about. A procedure built on that expectation will produce not false positives but false negatives, and a false negative here cannot be undone.

Third, the relevant risk includes foreseeable onward removal. The policy under FARRA is not to "expel, extradite, or otherwise effect the involuntary return" of a person to a country where torture is likely. A State that sends a person to an intermediary that will predictably send him or her on to a place of danger has violated that provision. The Committee has so held for more than twenty-five years, and the record here confirms the risk is not hypothetical: one named Plaintiff, protected by a court from removal to Guatemala, was sent to Mexico and promptly deported by Mexico to Guatemala.

Fourth, diplomatic assurances may inform the Article 3 assessment but cannot replace it. For two decades, the Executive Branch treated such assurances as rare, case-specific instruments. The Policy instead treats a categorical, undisclosed assurance as conclu-

sive for every person sent to the assuring country, before anyone has asked what any person fears or from whom. No generalized assurance can speak to risks the assuring government does not know about, such as persecution by non-State actors or rogue officials, or dangers tied to a particular person's identity or history. Post-return monitoring, in *amici*'s experience, detects abuse after the fact at best. *Munaf v. Geren*, 553 U.S. 674 (2008), does not hold otherwise: it rested on an individualized Executive determination of exactly the kind the Policy dispenses with.

The principle *amici* urge is modest. Before removing a person to a country not previously identified, the Government must give notice of that country and a meaningful opportunity to raise a fear of torture there or of onward refoulement, and must assess any assurance against what the person says. That is what Article 3 requires, what FARRA incorporates, what the regulations contemplate, and what the U.S. has for decades told the world it does.

ARGUMENT

I. FARRA INCORPORATES CAT ARTICLE 3'S DESTINATION-SPECIFIC OBLIGATION, AS THE U.S. HAS LONG RECOGNIZED

A. FARRA IMPLEMENTS ARTICLE 3 AND ADOPTS THE CONVENTION'S MEANING

The U.S. signed the Convention on April 18, 1988, and deposited its instrument of ratification on October 21, 1994. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85. Article 3 provides:

> 1. *No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*
>
> 2. *For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.*

The Senate's resolution of advice and consent declared Articles 1 through 16 non-self-executing and attached an understanding that "substantial grounds" means that it is "more likely than not" that the person would be tortured. 136 Cong. Rec. S17486-01, 1990 WL 168442 (Oct. 27, 1990). The Senate attached no reservation to Article 3 itself. *See* S. Exec. Rep. No. 101-30 (1990).

Congress then incorporated the Article 3 obligation into domestic law. FARRA declares it

> *the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.*

Pub. L. No. 105-277, div. G, § 2242(a), 112 Stat. 2681-822 (Oct. 21, 1998) (8 U.S.C. § 1231 note). It directed the relevant agencies to "prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture," subject to the Senate's reservations, understandings, and declarations. *Id.* § 2242(b). And it provided that the terms used in the section "have the meanings given those terms in the Convention." *Id.* § 2242(f)(2). This Court has accordingly described FARRA as the statute that "implements Article 3." *Nasrallah v. Barr*, 590 U.S. 573, 580 (2020).

Three consequences follow. First, whatever the status of the Convention standing alone, *see Medellín v. Texas*, 552 U.S. 491, 505 (2008), the Article 3 obligation binds the Executive as a matter of statute and regulation. Second, because Congress defined FARRA's terms by reference to the Convention, the meaning of Article 3 in international law and practice is directly relevant to the meaning of FARRA and its regulations. Third, that meaning is informed by the views of the treaty body the States parties created to monitor the Convention's implementation, as well as the practice of other treaty parties. *See United States v. Duarte-Acero*, 208 F.3d 1282, 1287 (11th Cir. 2000) (relying on the interpretation of "the body charged under the ICCPR with monitoring its implementation"); *Abbott v. Abbott*, 560 U.S. 1, 16 (2010) (other treaty parties' views "entitled to considerable weight") (internal quotation marks omitted); *cf. Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353 (2006) (ICJ's interpretation of treaty deserves "respectful consideration"). *Amici* present the Committee's General Comments and decisions in that spirit.

The Committee's most comprehensive statement on Article 3 is General Comment No. 4, adopted in 2017 after consultation with States parties, including the U.S. Comm. Against Torture, *General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22*, U.N. Doc. CAT/C/GC/4 (Sept. 4, 2018)[4] ("General Comment No. 4"). It confirms that the non-refoulement obligation, like the prohibition of torture itself, is absolute. *Id.* ¶ 9.

B. THE NON-REFOULEMENT OBLIGATION ATTACHES TO THE ACTUAL DESTINATION

Article 3 prohibits return "to another State" where torture is likely and directs attention to conditions "in the State concerned." That is the State to which the person is actually being sent. As the Committee has explained, the question is whether the person faces a "foreseeable, personal, present and real" risk of torture "in a State to which the person is facing deportation." General Comment No. 4 ¶ 11. A person may be safe in one country and in mortal danger in another; a finding about one country cannot be transposed to another.

The regulations say the same thing. Protection under the Convention turns on whether "it is more likely than not that [the applicant] would be tortured if removed to the proposed country of removal," and the adjudicator must consider "all evidence relevant to the possibility of future torture" in that country. 8 C.F.R.

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[4] https://www.ohchr.org/en/documents/general-comments-and-recommendations/catcgc4-general-comment-no-4-2017-implementation.

§ 1208.16(c)(2)–(3). When protection is granted, it is granted as to that country; the regulations preserve the Government's authority to remove the person "to a third country other than the country to which removal has been withheld or deferred," *id.* § 1208.16(f), which the agency explained at promulgation means a country "where he or she would not be tortured." Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8481 (Feb. 19, 1999). The premise of that authority is that someone will determine whether the third country is such a place.

The Government responds that class members have final removal orders and "have had a prior opportunity to raise withholding or CAT claims." Pet. Br. 44. That may well be true of the countries named in their orders. It is necessarily untrue of a country first identified after the issuance of any final disposition. The Article 3 question is country-specific, and the most diligent applicant cannot present evidence about a destination that has not been disclosed.

C. THE U.S. HAS REPEATEDLY ACKNOWLEDGED THAT THIRD-COUNTRY REMOVALS REQUIRE NOTICE OF THE DESTINATION AND AN OPPORTUNITY TO RAISE FEAR CONCERNS

The U.S. itself has taken the same position before this Court as the *amici* now take. At argument in *Riley v. Bondi*, No. 23-1270 (Mar. 24, 2025), the Government told this Court it could remove a noncitizen to a third country "with the following caveat: We would have to give the person notice of the third country and give them the opportunity to raise a reasonable fear of

torture or persecution in that third country." Tr. of Oral Arg. 33:9–16. At argument in *Johnson v. Guzman Chavez*, Justice Kagan asked whether, before removing a person to a different country, the Government "would have to provide him notice, and if he had a fear of persecution or torture in that country, he would be given an opportunity to contest his removal to that country." The Government answered: "Yes, that's right." Tr. of Oral Arg. 20:19–25, *Johnson v. Guzman Chavez*, 594 U.S. 523 (2021) (No. 19-897).

The U.S. has said the same to the Committee, stating that "[i]n the United States, all individuals subject to immigration removal or extradition are provided an opportunity to raise a claim that their transfer to a *particular country* would be inconsistent with CAT Article 3." *Observations of the United States of America on the Committee Against Torture's Draft General Comment No. 1 (2017) on Implementation of Article 3 in the Context of Article 22*, ¶ 12 (Apr. 5, 2017) (emphasis added). Even while defending the use of diplomatic assurances, the U.S. and three allies told the Committee that "the circumstances of every case must be assessed individually." *Joint Observations of Canada, Denmark, the United Kingdom, and the United States of America on Paragraphs 19–20 of the Committee Against Torture's Draft General Comment No. 1 (2017) on Implementation of Article 3 in the Context of Article 22*, § 5 (Mar. 31, 2017).[5]

[5] https://www.ohchr.org/sites/default/files/Documents/HRBodies/CAT/GCArticle3/JointSubmission.pdf.

These statements were accurate descriptions of the law and U.S. policy. The present Policy departs from them.

II. ARTICLE 3 REQUIRES A PRE-REMOVAL OPPORTUNITY TO RAISE A DESTINATION-SPECIFIC RISK

A. NOTICE MUST COME IN TIME TO CONTEST THE DESTINATION, AND REVIEW MUST PRECEDE REMOVAL

A substantive refoulement prohibition is only as effective as the procedure that applies it. The Committee has therefore consistently read Article 3 to carry procedural content. As it explained in General Comment No. 4:

> *[E]ach case should be examined individually, impartially and independently by the State party through competent administrative and/or judicial authorities, in conformity with essential procedural safeguards, notably the guarantee of a prompt and transparent process, a review of the deportation decision and of a suspensive effect of the appeal. In each case, the person concerned should be informed of the intended deportation in a timely manner. Collective deportation, without an objective examination of the individual cases with regard to personal risk, should be considered as a violation of the principle of non-refoulement.*

General Comment No. 4 ¶ 13. States should ensure "the right of each person concerned to have the case

examined individually and not collectively," access to counsel and interpreters, and the ability to appeal to an independent body "within a reasonable period of time from the notification" of the decision. *Id.* ¶ 18(a)–(c), (e).[6]

The Committee applied these principles in *Agiza v. Sweden*, Commc'n No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (May 20, 2005).[7] Relying on Egyptian assurances, Sweden expelled Mr. Agiza the same day it decided to do so; his lawyer only received notice the following day. *Id.* ¶¶ 2.5, 13.9. The Committee held that Article 3 requires "an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise," *id.* ¶ 13.7, and that Sweden breached it by immediately executing the decision, leaving no avenue for review, *id.* ¶ 13.8. *See also X v. Kazakhstan*, Commc'n No. 554/2013, U.N. Doc. CAT/C/55/D/554/2013, ¶ 12.7 (Aug. 3, 2015)[8] (State must "carry out a thorough and individualized risk assessment" before transfer) (*amici* Grossman and Modvig participating as Committee members).

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[6] *Amicus* UNSR Madi has also emphasized the importance of individualized proceedings, legal assistance, and effective remedy as procedural safeguards and cautioned that allowing removals without individual assessments may be incompatible with due process guarantees. Report of the Special Rapporteur on the Human Rights of Migrants, Gehad Madi: *Externalization of Migration Governance and Its Effect on the Human Rights of Migrants*, U.N. Doc. A/80/302, ¶¶ 29–30, 63(i) (Aug. 4, 2025), https://docs.un.org/en/A/80/302.

[7] https://docs.un.org/en/CAT/C/34/D/233/2003.

[8] https://docs.un.org/en/CAT/C/55/D/554/2013.

This Court's recent decisions reflect the same understanding. Notice of removal must be given "within a reasonable time and in such a manner as will allow [the person] to actually seek habeas relief in the proper venue before such removal occurs," *Trump v. J.G.G.*, 604 U.S. 670, 673 (2025), and "notice roughly 24 hours before removal, devoid of information about how to exercise due process rights to contest that removal, surely does not pass muster," *A.A.R.P. v. Trump*, 605 U.S. 91, 95 (2025). Those decisions arose under the Due Process Clause, but the point holds under FARRA. As the First Circuit explained, a right to avoid removal to a particular country "means little if one is not given prior notice of an intended third-country removal to that country and a meaningful opportunity to assert their fear of torture if removed to that location." J.A. 40.

B. A PROCEDURE THAT DEPENDS ON UNPROMPTED DISCLOSURE WILL MISS THOSE AT GREATEST RISK

The Policy has two tracks. Where the State Department has accepted a receiving country's assurances, the person "may be removed without the need for further procedures." J.A. 4. Otherwise, the person is served with a notice naming the destination; officers "will not affirmatively ask" about fear; removal generally follows at least 24 hours later, but "in exigent circumstances" after as little as six hours; and only a person who "affirmatively state[s] a fear" is referred for screening. J.A. 4–5, 7, 310–13; Pet. Br. 9, 42, 45. The Government defends not asking on the grounds that asking "would yield an excessive number of false-positive" claims and that immigration law "places the onus upon the alien." Pet. Br. 45.

Amici's experience is that this design will fail the people Article 3 exists to protect. When first asked, torture survivors frequently do not disclose it or the fear of its repetition; they are far less likely to do so unasked. The reasons are well documented: shame, particularly after sexual torture; the avoidance that is a core symptom of post-traumatic stress; distrust of uniformed officials holding them in custody; fear that disclosure will reach the persecutor; and trauma's effects on memory and narration. *See* Office of the U.N. High Comm'r for Human Rights, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. HR/P/PT/8/Rev.2, ch. IV, §§ A.3–A.4, A.9, B.11–B.13, ¶¶ 275, 501 (2022).[9] Interviews should therefore be conducted by personnel trained according to the *Méndez Principles*,[10] in private, with adequate time, and with awareness that inconsistency, reticence, and delayed disclosure are expected features of a survivor's account, not signs that there is nothing to disclose. *Id.* ¶¶ 310–315, 342–345. The Policy inverts each precept.

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[9] https://www.ohchr.org/sites/default/files/documents/publications/2022-06-29/Istanbul-Protocol_Rev2_EN.pdf.

[10] *The Principles on Effective Interviewing for Investigations and Information Gathering*, Assoc. for the Prevention of Torture, May 2021 (the "Méndez Principles"), https://www.apt.ch/our-prioritiesdignity-and-fairness-criminal-justice-system/principles-effective-interviewing, are international guidelines promoting non-coercive, science-based interviewing consistent with international human rights standards. They followed a four-year process initiated in response to a call by *amicus* Juan E. Méndez, then UNSR on Torture, and were developed by 15 experts in consultation with more than 80 others from over 40 countries, including *amici* Jens Modvig and Manfred Nowak.

The timing compounds the problem. Within six to twenty-four hours, while detained, a person must learn that the destination has changed, understand that fear must be volunteered immediately, assess the risk in a country he or she may never have heard of, and articulate it in a language an officer understands. A detained person without counsel who fears being handed on to a persecutor, or targeted in the third country for sexual orientation, ethnicity, or political history, has no realistic opportunity to say so.

These concerns are not abstract. Eighteen UN Special Procedures mandates (including *amicus* UNSR Madi) have raised them with the U.S., recalling that involuntary return requires examination of each individual's circumstances and effective procedural safeguards. Special Procedures Mandate Holders, Allegation Letter to the United States, AL USA 20/2026, at 20–22 (Aug. 31, 2026) ("AL USA 20/2026").

The Government's concern about false positives thus has the problem backwards. A screening system that waits to be told produces false negatives, and the cost of a false negative under Article 3 is torture the U.S. has promised to prevent. A rule that the Government need not ask, and need wait only hours for an answer it has not solicited, makes an Article 3 claim practically impossible to raise.

III. ARTICLE 3 REACHES FORESEEABLE ONWARD ("CHAIN") REFOULEMENT

A. FARRA AND ARTICLE 3 REACH INDIRECT RETURN

FARRA's policy is not only that the U.S. will not "expel" or "extradite" a person to a country where torture is likely, but that it will not "otherwise effect the involuntary return" of that person there. § 2242(a). The phrase looks to the result, not the means. When the U.S. removes a person to an intermediary country that will foreseeably send the person on to a country where he or she faces torture, it has effected the person's return there as surely as if it had done so directly. Article 3's prohibition on "return ('refouler')" has long been understood in the same way: it would be hollow if it could be satisfied by interposing another border.

B. THE COMMITTEE HAS APPLIED ARTICLE 3 TO ONWARD REMOVAL FOR OVER TWENTY-FIVE YEARS

General Comment No. 4 addresses onward removal explicitly:

> *[T]he person at risk should never be deported to another State from which the person may subsequently face deportation to a third State in which there are substantial grounds for believing that the person would be in danger of being subjected to torture.*

General Comment No. 4 ¶ 12. The Committee accordingly asks "whether the complainant is at risk of further deportation to another State," *id.* ¶ 49(g), and

considers "the risk of expulsion to a third country where the person may be in danger of being subjected to torture," *id.* ¶ 45(l).[11]

The Committee applied this principle for nearly two decades before restating it in General Comment No. 4. In *Korban v. Sweden*, it held that Sweden could not return an Iraqi national to Jordan "in view of the risk he would run of being expelled from that country to Iraq," because "another State" in Article 3 includes "any State to which the [individual] may subsequently be expelled, returned or extradited." Commc'n No. 88/1997, U.N. Doc. CAT/C/21/D/88/1997, ¶ 7 (Nov. 16, 1998).[12] *See also Ayas v. Sweden*, Commc'n No. 97/1997, U.N. Doc. CAT/C/21/D/97/1997, ¶ 7 (Nov. 12, 1998) (barring return to Turkey "or to any other country where he runs a real risk of being expelled or returned to Turkey");[13] *Haydin v. Sweden*, Commc'n No. 101/1997, U.N. Doc. CAT/C/21/D/101/1997, ¶ 6.9 (Nov. 20, 1998) (same).[14]

The Committee makes this inquiry even where it finds no violation. In *K.S. v. Switzerland*, concerning

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[11] *Amicus* UNSR Madi's 2025 report likewise explains that the prohibition bars transfer to a State that will send the person on to a place of danger. U.N. Doc. A/80/302, ¶¶ 25–26. His 2026 report identifies documented onward returns following U.S. third-country transfers. Report of the Special Rapporteur on the Human Rights of Migrants, Gehad Madi,, *Externalization of Migration Governance: New Trends and Specific Aspects*, U.N. Doc. A/HRC/62/35, ¶ 22 (May 14, 2026), https://docs.un.org/en/A/HRC/62/35.

[12] https://docs.un.org/en/CAT/C/21/D/88/1997.

[13] https://docs.un.org/en/CAT/C/21/D/97/1997.

[14] https://docs.un.org/en/CAT/C/21/D/101/1997.

the removal of a Sri Lankan Tamil to India, the Committee—including *amicus* Professor Rodríguez-Pinzón—examined whether he "would currently face a risk of being subjected to torture or chain deportation in India." Commc'n No. 832/2017, U.N. Doc. CAT/C/72/D/832/2017, ¶ 7.8 (Nov. 18, 2021).[15] *See also Z.T. v. Australia*, Commc'n No. 153/2000, U.N. Doc. CAT/C/31/D/153/2000, ¶¶ 6.4–6.5 (Nov. 11, 2003) (assessment extends to "a third country where it is foreseeable that he subsequently may be expelled").[16] In each decision, the inquiry was one of foreseeability, to be made by the sending State before transfer.

C. THE RECORD CONFIRMS THAT THE RISK OF "CHAIN" REFOULEMENT IS REAL

The Court of Appeals recognized that the Policy does not "provide protection against 'chain refoulement,'" J.A. 5 n.2, and highlighted a congressional staff report finding that, as of January 2026, "more than eighty percent of the migrants sent to third countries paid by the United States to take them in have already returned to their country of origin or are in the process of doing so." *Id.* at 5–6 n.2 (quoting U.S. Senate Comm. on Foreign Relations, Minority Staff, *At What Cost? Inside the Trump Administration's Secret Deportation Deals* 5 (Feb. 2026)).[17]

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[15] https://digitallibrary.un.org/record/3986018?v=pdf.

[16] https://docs.un.org/en/CAT/C/31/D/153/2000.

[17] https://www.foreign.senate.gov/imo/media/doc/(FINAL%20-%20web)%20At%20What%20Cost%20-%20Inside%20the%20Trump%20Administration%27s%20Secret%20Deportation%20Deals_2.17.26.pdf.

Named Plaintiff O.C.G. is an example. An immigration judge had granted him withholding of removal to Guatemala, yet "[u]nder DHS's third-country removal policy, O.C.G. was removed to Mexico, and from there Mexico deported him to Guatemala." *Id.*

The August 2026 joint UN Special Procedures communication discussed above (co-signed by *amicus* UNSR Madi) specifically raises concerns about third-country removals by the U.S. and describes receiving countries subsequently removing individuals to their countries of origin, including people who had obtained protection against such return in the U.S. *AL USA 20/2026,* at 21–22. In one example, the U.S. sent eight individuals to Ghana, and, on the same day they arrived in that country, they were sent to their countries of origin without a meaningful opportunity to seek protection. *Id.* at 15.

Onward removal is thus a real risk, not a hypothetical. A procedure that asks only whether the person will be tortured in the intermediary country, and gives no chance to say "that country will send me back," cannot detect the very risk an earlier protection order was entered to prevent.

D. OTHER NATIONAL AND REGIONAL COURTS AGREE

Courts of other States parties, applying the same non-refoulement principle, have insisted on the same inquiry. In *R (AAA (Syria)) v. Secretary of State for the Home Department*, [2023] UKSC 42 (Nov. 15, 2023), the U.K. Supreme Court unanimously held unlawful a scheme for removing asylum seekers to Rwanda in reliance on Rwandan assurances. It held that there

were substantial grounds for believing that persons removed would face a real risk of onward refoulement; that the assurances, though given in good faith, had to be assessed against Rwanda's actual record, including its failure to honor similar undertakings to Israel; and that the court was required to evaluate the risk for itself rather than defer to the executive. *Id.* ¶¶ 47–49, 52–55, 95–105. The European Court of Human Rights likewise requires a State transferring a person to an intermediary country to examine whether that country will adequately consider the person's protection claim before sending him on. *See Ilias & Ahmed v. Hungary*, App. No. 47287/15, ¶¶ 134–141 (Eur. Ct. H.R. [GC] Nov. 21, 2019); *M.S.S. v. Belgium & Greece*, App. No. 30696/09, ¶¶ 344–361 (Eur. Ct. H.R. [GC] Jan. 21, 2011). While not binding, these foreign decisions confirm that the risk of onward refoulement is a routine part of the non-refoulement inquiry.

IV. INDIVIDUALIZED DIPLOMATIC ASSURANCES MAY INFORM, BUT NOT REPLACE, THE ARTICLE 3 ASSESSMENT

A. ASSURANCES ARE EVIDENCE TO BE WEIGHED, NOT A SUBSTITUTE FOR THE INQUIRY

Amici do not contend that diplomatic assurances are irrelevant. The Committee recognizes them as a receiving State's "formal commitment" about the treatment of a transferred person, but insists that they "should not be used as a loophole to undermine the principle of non-refoulement." General Comment No. 4 ¶¶ 19–20. The question is whether, in light of everything known about the receiving State and the particular person, an assurance reliably eliminates a

risk to the person that would otherwise bar the transfer.

The Committee's decisions apply that rule. In *Agiza*, the Committee found a violation despite Egypt's written assurances because "[t]he procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk." CAT/C/34/D/233/2003, ¶ 13.4. In *Pelit v. Azerbaijan*, the Committee observed that seeking assurances is itself "an acknowledgment that, without more, expulsion … would raise issues" under Article 3, and faulted the State because it had neither produced the assurances for independent assessment nor detailed its post-return monitoring with "sufficient specificity" to show that it was "objective, impartial and sufficiently trustworthy." Commc'n No. 281/2005, U.N. Doc. CAT/C/38/D/281/2005, ¶ 11 (May 1, 2007).[18] And in *X v. Kazakhstan*, the Committee held that assurances "cannot be used as an instrument to avoid the application of the principle of non-refoulement" where the sending State had not itself carried out an individualized assessment. CAT/C/55/D/554/2013, ¶¶ 12.7–12.8.

Successive UNSRs, including some of the *amici*, have reached the same conclusion from direct observation. In his May 2026 report, *amicus* UNSR Madi expressed deep concern that migrants removed from the U.S. have been indirectly refouled and highlighted the ineffectiveness of diplomatic assurances, especially blanket assurances "as they do not permit the

[18] https://docs.un.org/en/CAT/C/38/D/281/2005.

required individualized risk assessment and are difficult to monitor in practice." U.N. Doc. A/HRC/62/35, ¶ 22. In 2004, then-UNSR on Torture Theo van Boven warned that assurances "may be no more than empty gestures" unless they "contain an unequivocal guarantee that the person concerned will not be subjected to torture," accompanied by concrete safeguards and by "a system of effective monitoring" that is "prompt, regular and include[s] private interviews." Theo van Boven, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/59/324, ¶¶ 40–42 (Sept. 1, 2004).[19] The next year, *amicus* Professor Nowak found that "post-return monitoring mechanisms do little to mitigate the risk of torture"; that assurances "are not legally binding, therefore they carry no legal effect and no accountability if breached"; and that they had proven "unreliable and ineffective in the protection against torture and ill-treatment." Manfred Nowak, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/60/316, ¶¶ 46, 51 (Aug. 30, 2005).[20] *See also* Comm. on Human Rights, *Civil and Political Rights, Including the Questions of Torture and Detention, Report of the Special Rapporteur on the Question of Torture*, U.N. Doc. E/CN.4/2006/6, summary & pt. III (Dec. 23, 2005).[21]

The Committee has said the same to the U.S. directly. In 2006, it recommended that assurances be relied upon only "after a thorough examination of the

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[19] https://docs.un.org/en/A/59/324.

[20] https://docs.un.org/en/A/60/316.

[21] https://docs.un.org/en/E/CN.4/2006/6.

merits of each individual case," with "adequate judicial mechanisms for review" and "effective post-return monitoring arrangements," and that the U.S. "always ensure that suspects have the possibility to challenge decisions of refoulement." Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States of America*, U.N. Doc. CAT/C/USA/CO/2, ¶¶ 20–21 (July 25, 2006).[22] In 2014, it urged the U.S. to "refrain from seeking and relying on diplomatic assurances 'where there are substantial grounds for believing that [a person] would be in danger of being subjected to torture,'" adding that "[t]he principle of non-refoulement should always have precedence over any other protection measure." Comm. Against Torture, *Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America*, U.N. Doc. CAT/C/USA/CO/3-5, ¶ 16 (Dec. 19, 2014).[23]

B. THE REGULATIONS AND PAST EXECUTIVE PRACTICE TREAT ASSURANCES AS CASE-SPECIFIC

The regulations accommodate assurances in exactly this way. The Secretary of State may forward "assurances that the Secretary has obtained from the government of a specific country that *an alien* would not be tortured there if *the alien* were removed to that country." 8 C.F.R. § 208.18(c)(1) (emphasis added). The Attorney General (now the Secretary of Homeland Security) must then "determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien's removal to

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[22] https://docs.un.org/en/CAT/C/USA/CO/2.

[23] https://docs.un.org/en/CAT/C/USA/CO/3-5.

that country consistent with Article 3." *Id.* § 208.18(c)(2). Only "[o]nce assurances are provided under paragraph (c)(2)" is the person's Convention claim withdrawn from the adjudicators. *Id.* § 208.18(c)(3). The regulation thus presupposes an identified person, a claim that has been or could be made, and a reliability determination about that person's removal. As the First Circuit recognized, "nothing in that regime contemplates the substitution of blanket diplomatic assurances for the detailed and individualized procedures" governing protection claims. J.A. 32 n.14.

The Government reads "government of a specific country" to mean that an assurance need not be "alien-specific," and further asserts that "a foreign government's assurance is credible when it is categorical rather than individualized." Pet. Br. 37, 40. That is not how the Executive Branch has understood its own regulation. In 2009, an interagency task force chaired by the Attorney General recommended "careful case-by-case assessments of assurances"; it advised that where an individual raises "a particularized, reasonable, and credible concern about torture," the assurances "should address that concern"; and it called for monitoring that provides "consistent, private access to the individual who has been transferred." DOJ, *Report of the Special Task Force on Interrogation and Transfer Policies* 13, 15, 17 (Aug. 2009).[24] Two years later, the DHS Inspector General, reviewing the use of assurances in removal cases, reported that assurances were "rare and extraordinary political documents"; that "[t]he consensus was that assurances

[24] https://www.justice.gov/oip/foia-library/2009_report_special_task_force_interrogation_and_transfer_policies/dl.

need to be and are case specific, not country specific"; and that DHS would consider them "only in extraordinary cases." DHS Office of Inspector General, *DHS Detainee Removals and Reliance on Assurances*, OIG-11-100, at 4, 20, 24 (Nov. 2011).[25] The Policy abandons that understanding.

C. BLANKET ASSURANCES CANNOT ADDRESS THE RISKS ARTICLE 3 GUARDS AGAINST

The First Circuit's "difficulty seeing how a receiving country can credibly provide blanket assurances that all removed noncitizens will not be persecuted or tortured there," J.A. 32 n.15, reflects a problem *amici* have confronted repeatedly in practice. A government can promise what its own agents will do, at least while it is in power. It cannot credibly promise, for every unidentified future arrival, protection against risks it has never been told about and may be unable to control. The limits of a blanket assurance are thus structural, not incidental.

First, torture under the Convention includes acts committed with the "consent or acquiescence" of a public official. CAT art. 1; 8 C.F.R. § 1208.18(a)(1). Much of the torture *amici* have documented is inflicted by police, prison guards, or security services acting outside policy, or by criminal organizations with official complicity. A central government's undertaking that "removed noncitizens will not be persecuted or tortured" does not reach those actors unless

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[25] https://www.oig.dhs.gov/reports/2011-09/dhs-detainee-removals-and-reliance-assurances/oig11-100nov11.

the receiving State undertakes, and is able, to protect each arrival against them.

Second, the gravest risks are often specific to the person: a sexual orientation or gender identity criminalized in the destination; an ethnic or religious identity; a history of political activity; prior cooperation with law enforcement; or the reach of the home State's security services into the third country. None of this is known to a government that gives a categorical assurance in advance, and none of it will become known if the person is never asked. Article 3(2) requires the competent authorities to "take into account all relevant considerations." An assessment that forecloses the single most relevant source of information, the person, does not meet that standard. *See* General Comment No. 4 ¶¶ 13, 17, 18(a).

Third, an assurance against torture in the receiving State says nothing about onward removal. An assurance that Mexico would not torture O.C.G. would not have stopped Mexico from deporting him to Guatemala. Unless an assurance expressly and reliably forecloses onward transfer, it does not address the risk discussed in Part III above.

Fourth, the circumstances in which these assurances have been given warrant particular caution. The record does not disclose which countries have given assurances or on what terms. J.A. 32 n.15. They therefore cannot be independently tested, least of all by the person concerned, against the factors courts use to weigh assurances, namely, whether they are specific or general and vague, whether compliance can be objectively verified, and whether the receiving State has honored similar undertakings before. *See*

Othman (Abu Qatada) v. United Kingdom, App. No. 8139/09, ¶¶ 187–189 (Eur. Ct. H.R. Jan. 17, 2012);[26] *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, ¶¶ 123–125[27] (assurances against torture are harder to monitor and "generally" less reliable than assurances concerning the death penalty, and the person "must be given an opportunity to present evidence and make submissions as to the value of such assurances"). Moreover, several receiving States have reportedly been paid substantial sums to accept transferees. *See At What Cost?*, *supra*, at 5. An assurance that is undisclosed, unreviewable by the person it concerns, and paid for by the sending State is the kind to which the Committee's warning about "loophole[s]" most directly applies.

Fifth, post-return monitoring cannot cure these defects. Monitoring, by definition, operates after transfer. In *amici*'s experience, monitors often arrive late, interview in the presence of officials, lack the forensic expertise to identify injuries, and have little remedy when they find abuse. In Mr. Agiza's case, the first monitoring visit took place more than a month after his return. CAT/C/34/D/233/2003, ¶¶ 3.4–3.5, 5.4, 12.1–12.8. Monitoring may bear on the credibility of an assurance; it is not a reason to dispense with the assessment that precedes transfer.

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[26] https://hudoc.echr.coe.int/eng?i=001-108629.

[27] https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1937/index.do.

D. *MUNAF V. GEREN* DOES NOT HOLD OTHERWISE

The Government relies on *Munaf v. Geren*, 553 U.S. 674 (2008), for the proposition that when the Executive credits an assurance, "that decision is conclusive." Pet. Br. 38. *Munaf* does not bear that weight. The petitioners, American citizens held by U.S. forces in Iraq, were to be transferred to the criminal custody of Iraq, the territorial sovereign. In declining to block the transfer, this Court relied on the Executive's representation that it is "the policy of the United States not to transfer an individual in circumstances where torture is likely to result," and on the State Department's determination, made for that case, that the Iraqi ministry that would have authority over the men, and its detention facilities, generally met international standards. 553 U.S. at 702. This Court noted that claims under FARRA were not properly before it, *id.* at 703 & n.6, and emphasized that it was not deciding "a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway," *id.* at 702. Three Justices would have extended that caveat to cases where "the probability of torture is well documented, even if the Executive fails to acknowledge it." *Id.* at 706 (Souter, J., concurring).

Munaf thus assumed the very thing the Policy omits: an individualized Executive judgment about a known person's risk in a known place, made against a stated policy not to transfer where torture is likely. The deference *Munaf* describes is deference to that judgment. It is not a license to treat a categorical, undisclosed assurance as conclusive for persons whose circumstances no official has considered. Nor was

Munaf decided under FARRA, whose regulations expressly provide for a reliability determination and an adjudicative process. 8 C.F.R. § 208.18(c).

CONCLUSION

The principle *amici* present is a modest one. When the Government proposes to remove a person to a country not previously identified and examined, the Article 3 protection Congress implemented through FARRA cannot function unless, before transfer, there is an effective way to identify and evaluate a substantial, country-specific risk of torture, including a foreseeable risk of onward refoulement. Diplomatic assurances may form part of that evaluation, but must be assessed for reliability against what is known about the receiving State and the particular person, as the regulations contemplate.

That holding would not require a new adjudication of the underlying removal order, a fixed schedule of judicial review, or the invalidation of foreign assurances as a whole, and it would leave the Executive wide latitude to design prompt and orderly procedures. Should the Court resolve this case on jurisdictional or remedial grounds, *amici* respectfully urge that it not endorse an interpretation of FARRA or its regulations under which the U.S. may transfer a person to a destination that no one has examined for the risk of torture.

The judgment of the court of appeals should be affirmed insofar as it holds that DHS's Policy is unlawful under FARRA and its implementing regulations.

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